IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 579.

HARRY PORETSKY, ARTHUR W. MACHEN, Trustee, and THOMAS MACHEN, *Petitioners,*

v.

JULIUS H. WOLPE, ET AL., and CHARLES W. KUTZ, ET AL., as Members of the Zoning Commission of the District of Columbia, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Harry Poretsky, Arthur W. Machen, Trustee, and Thomas Machen, pray that a Writ of Certiorari issue to review the decision of the United States

Court of Appeals for the District of Columbia entered June 19, 1944 (R. 85), (petition for rehearing denied July 13, 1944 (R. 89)) in case No. 8546, that Court having assumed to grant a special appeal from an order of the District Court of the United States for the District of Columbia denying to Wolpe et al., of respondents herein, leave to intervene in an action by the present petitioners as plaintiffs against the Zoning Commission of the District of Columbia as sole defendant, under F. R. C. P. 24(b) (2) *after* judgment therein in favor of plaintiffs had been rendered by the District Court and carried into effect by the Zoning Commission of the District of Columbia, defendant therein, and *after* the time had expired within which a motion for a new trial could be made or an appeal could be taken. In the United States Court of Appeals for the District of Columbia the judgment of the District Court denying said intervention was reversed.

OPINIONS OF THE COURTS BELOW.

The opinion of the District Court of the United States for the District of Columbia appears in this record at pages 77-78. The opinion of the United States Court of Appeals for the District of Columbia appears in this record at pages 85-87.

RULES AND STATUTES INVOLVED.*

F. R. C. P. 24 (28 U. S. C. A. foll. 723 c)

Rule 10 of the General Rules of the United States Court of Appeals for the District of Columbia (prior to the amendment thereof January 7, 1944).

Zoning Act for the District of Columbia (Act of March 1, 1920, 41 Stat. 500, amended by Act of June 30, 1938, 52 Stat. 797, 800, D. C. Code, 1940 edition, Title 5, Sec. 412, et seq., Sec. 422).

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* The Rules and Statutes involved (except F. R. C. P.) are set out in Appendix p. 27-29).

STATEMENT OF MATTER INVOLVED.

This case involves the question whether owners of property in the neighborhood of a Parcel of land have a right under F. R. C. P. 24 to intervene in an action by the owners of said Parcel against the Zoning Commission to require it to restore to said Parcel the zoning classification existing prior to a change thereof by said Zoning Commission, and whether an application for intervention is timely under the circumstances of the case.

In 1933 the Zoning Commission of the District of Columbia zoned for apartment house use a city block known as Parcel 70/100 and owned by petitioners Machen.

In May, 1941, petitioner Poretsky contracted to buy the Parcel for $77,500, and in September, 1941, filed with the Building Inspector his application and plans for an apartment house on the Parcel (R. 49, 51). On November 7, 1941, the Zoning Commission changed the zoning and restricted the use of the Parcel to detached single-family dwellings (R. 53).

On February 11, 1942, the petitioner Poretsky filed this action in the District Court of the United States for the District of Columbia against the respondent Zoning Commission as sole defendant, to annul its said order of November 7, 1941, and for a mandatory injunction for restoration of the prior apartment house zoning of said Parcel (R. 3, 12). Petitioners Machen intervened as parties plaintiff. After a trial, during which the trial justice made a personal inspection of the Parcel and of the neighborhood, the District Court found "that the action of the Zoning Commission was unreasonable, arbitrary, capricious and void" (R. 55). (Cf. *Nectow* v. *Cambridge,* 277 U. S. 183, 72 L. ed. 842.)

On April 7, 1943, final judgment was entered in favor of plaintiffs (R. 56). The Zoning Commission then voted unanimously not to appeal from the judgment and carried the judgment into effect (R. 75).

On May 6, 1943, respondents Wolpe et al., being owners of property in the vicinity of said Parcel, filed a motion

under F. R. C. P. 24 (b)(2) (Permissive Intervention) for leave to intervene in order to move for a new trial, or, in the alternative, to be allowed to appeal the judgment. This motion was *not* accompanied by a proposed intervening petition (R. 57), (F. R. C. P. 24 (c)) but said petition was filed May 8, 1943 (R. 57). This was too late under F. R. C. P. 59 to move for a new trial and too late to appeal under Rule 10 of the General Rules of the United States Court of Appeals for the District of Columbia (Appendix p. 29).

None of said proposed intervenors had any ownership of or financial, direct and immediate interest in said Parcel, had acquired no right of intervention, there had been no violation of the zoning law (D. C. Code 1940, Title 5-422, Appendix p. 28) and none of their properties adjoins or is contiguous to said Parcel, but all are separated therefrom by public streets and most of them are one or more city blocks distant (R. 67).

The motion to intervene was denied, the District Court holding (R. 77, 78) that (1) the time for filing motion for a new trial had expired before the motion was made; (2) intervention could not be allowed after final judgment; (3) the public interest was represented by the defendant Zoning Commission; and (4) the case had been fully heard, testimony taken, and fully argued and there was nothing stated in the intervening petition that would cause the Court to change its view even if the proposed intervenors had been made parties.

The United States Court of Appeals for the District of Columbia granted a special appeal (R. 79), and on June 19, 1944, reversed and remanded the case (R. 88). On July 13, 1944, it denied petition for rehearing (R. 89).

The judgment of said Court of Appeals is final as to the petitioners and entitles them to apply for the writ of certiorari because it settled the right of respondents Wolpe et al. to intervene and it is not subject to review except by this Court. (Section 240-A, Judicial Code, 28 U. S. C. 347-A.)

The case was remanded in order that a general appeal from said final judgment in the main action may be considered on its merits in the United States Court of Appeals for the District of Columbia, in spite of the determination of the Zoning Commission not to appeal said final judgment (R. 75), and in spite of the fact that the time had expired within which either to move for a new trial or to appeal.

JURISDICTION OF THE COURT.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended (28 U. S. C. A. Sec. 347-a).

July 13, 1944 is the date of the order denying the petition for rehearing in the United States Court of Appeals for the District of Columbia (R. 89) of the decision of said Court rendered June 19, 1944 (R. 85).

QUESTIONS PRESENTED.

1. Does F. R. C. P. 24 authorize or permit intervention in an action by a property owner against a Zoning Commission instituted for the purpose of compelling the restoration of a prior existing zoning classification of plaintiff's property (1) where none of the proposed intervenors has any interest in said property; (2) where none of the properties of the proposed intervenors was adjoining or contiguous to plaintiff's property, but all were separated therefrom by public streets and many of said properties were one or more city blocks from plaintiff's property; (3) where no violation of the zoning law was involved, (4) where the final judgment in the main action had been entered and complied with by the defendant Zoning Commission before the application for intervention; and (5) where the public interest was represented by the Zoning Commission and the proposed intervenors were not and could not be bound by the judgment and their application presented

no claim or defense having a question of law or fact in common with that in the main action?

2. Is an order appealable which denies a motion for leave to intervene in an action against the Zoning Commission of the District of Columbia to require it to restore a prior existing zoning classification of a tract of land (1) where the motion to intervene was made by persons who had full knowledge of the pendency of the action, but was made *after* (a) the final judgment in the main action had been entered; (b) the time for moving for a new trial had expired; (c) the time to appeal had also expired; (d) the Zoning Commission, defendant in the main action, had refused to appeal and had carried the judgment into effect; and (2) where the proposed intervenors had no ownership or financial interest in the aforesaid tract of land, and (3) where the object of said motion was to impeach the judgment already granted by moving for a new trial, or, in the alternative, that the proposed intervenors be allowed to appeal said final judgment?

3. Is such a motion for leave to intervene "*timely*" under F. R. C. P. 24 (a) or (b), *after* the final judgment in the main action has been entered by the court and carried into effect by the defendant, Zoning Commission?

4. Do persons having neither ownership nor financial interest in the Parcel aforesaid, have such a direct and immediate interest in the *res* as to entitle them to intervene under F. R. C. P. 24 (a) or (b) *after* the final judgment has been rendered in the main action requiring the Zoning Commission to restore the prior existing zoning classification of said Parcel and *after* said final judgment has been carried into effect by the Zoning Commission and the prior zoning restored?

5. The rights of the original parties to this action having been adjudicated *before* the filing herein of the motion for leave to intervene, do not the decisions of this Court

(as illustrated by *United States* v. *California Co-op Canneries*, 279 U. S. 553, 556, 73 L. ed. 838, 841, 49 Sup. Ct. 423) forbid the granting of said motion for leave to intervene, and does not F. R. C. P. 24 (b) under which said motion herein was filed, in effect, also forbid the granting of said motion by the declaration that "In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties"?

REASONS FOR GRANTING THE WRIT.

1. The application of F. R. C. P. 24 to cases involving zoning has never before been determined by this Court, or any other federal court, and is a matter of national scope, interest and importance.

2. The United States Court of Appeals for the District of Columbia has so far departed from the accepted and usual principles of intervention that its decision in this case is in conflict with applicable decisions of this Court, as well as decisions of the Circuit Courts of Appeal. No other federal court has extended intervention under F. R. C. P. 24 so as to give to persons having no direct and immediate interest in the *res* either the absolute or permissive right to intervene in a case, particularly after the judgment in the case has been performed, and where no right of intervention is given by law.

3. The decision below, granting and sustaining leave to intervene as matter of right under F. R. C. P. 24(a)(2), upon an appeal from the order denying permissive leave to intervene in the case under F. R. C. P. 24(b)(2) after the final judgment in the principal action had been performed by the defendant, is in direct conflict with the decisions of this Court, illustrated by *United States* v. *California Co-op Canneries, supra, and Allen Calculators, Inc.* v. *National Cash Register Co.* .... U. S. ...., 88 L. ed. Advance Opinions 874, and is also in direct conflict with the deci-

sions of the Circuit Courts of Appeal, illustrated by *San Antonio Utilities League* v. *Southwestern Bell Telephone Company*, 86 F. (2) 584 (C. C. A. 5th 1936) and *Board of Drainage Commissioners* v. *Lafayette Southside Bank*, 27 F. (2d) 286 (C. C. A. 4th, 1928).

4. The matter of the timeliness of the intervention under F. R. C. P. 24 is an important question of federal practice which has not been, but should be, settled by this Court.

5. The United States Court of Appeals for the District of Columbia has decided an important question of local law in a way probably in conflict with the zoning law of the District of Columbia and with applicable local decisions such as *Bugher* v. *Gottwals*, 60 App. D. C. 340, 341, 54 F. (2d) 451; *Hazen* v. *Hawley*, 66 App. D. C. 266, 272, 86 F. (2d) 217.

WHEREFORE, it is respectfully submitted that this Court should grant the writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia in case No. 8546 below.

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BRIEF OF PETITIONERS.

When this case was presented to the United States Court of Appeals for the District of Columbia the principal issue was the appealability of the order of the District Court denying the respondents Wolpe et al, leave to intervene in the main case, they having sought such intervention under F. R. C. P. 24 (b)(2) (Permissive Intervention), after the judgment in the main action had been entered and carried out. The Appellate Court avoided that issue and disregarded the established principles enunciated by this Court in *United States* v. *California Co-op. Canneries,* 279 U. S. 553, 556, 73 L. ed. 838, 841, 49 Sup. Ct. Rep. 423, *Allen Calculators, Inc.,* v. *National Cash Register Co.,* — U. S. —, 88 L. ed. Advance Opinions 874, and other cases.

STATEMENT OF THE CASE.

The facts have been stated in the petition for the writ of certiorari (p. 3), and therefore are not repeated in this brief.

ARGUMENT.

I.

F. R. C. P. 24 Does Not Permit Intervention in an Action Against a Zoning Commission by Persons Having No Direct and Immediate Legal Interest in the Property Which is the Subject Matter of the Action.

F. R. C. P. 24 includes within itself the comprehensive inventory of the allowable instances for intervention. The basic principle underlying the rule is that the intervener shall have a direct and immediate legal interest in the property which is the subject matter of the action. That interest must be a specific legal interest and not a general interest, and must be asserted by a timely application. Without special statutory right, intervention will lie basically only "when the representation of applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action" (F. R. C. P. 24 (a)(2)); or "when an applicant's claim or defense and the main action have a question of law or fact in common." (F. R. C. P. 24 (b)(2)).

First consider the matter of "interest."

> "It is well settled that the only interest which will entitle a person to the right of intervention in a case is a legal interest as distinguished from interests of a general and indefinite character which do not give rise to definite legal rights."
>
> *Radford Iron Co.* v. *Appalachian Electric Power Co.*, 62 F. (2d) 940, 942 (1933).
>
> *Re Leaf Tobacco Board of Trade*, 222 U. S. 578, 56 L. ed. 323, 32 Sup. Ct. Rep. 833.

Jewell Ridge Coal Corp. v. *Local 6167 United Mine Workers, etc.*, 7 Fed. Rules Service 460, 462, 463, 3 F. R. D. 251.

The Zoning Commission of the District of Columbia as the guardian of the public interest defended the present action, as it was exclusively authorized to do by the zoning law. (Appendix p. 27)

In *San Antonio Utilities League* v. *Southwestern Bell Telephone Company*, 86 F. (2d) 584, 585 (C. C. A. 5th, 1936) the court said:

> "That, generally speaking, individual subscribers have no direct and immediate interest in a rate controversy and suit sufficient to authorize them to maintain or prosecute it, and that the matters involved in such a suit are matters entirely between the parties to it, the Utilities and the City, is settled by the authorities first above cited." *

Respondents Wolpe, et al. had no ownership of or financial interest in the Parcel of land to restore the prior existing zoning of which was the basis of the action by Poretsky and the Machens as plaintiffs against the Zoning Commission of the District of Columbia as defendant. At no point was their property adjoining or contiguous to said Parcel. Not only were their properties separated from said Parcel by public streets, but most of their said properties were one or more city blocks distant from said Parcel. Since there was no violation of the zoning law, none of the respon-

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* In support of this position the court referred to:

Re Englehard & Sons, 231 U. S. 646, 34 S. Ct. 258, 58 L. Ed. 416.

New York v. *New York Tel. Co.*, 261 U. S. 312, 43 S. Ct. 372, 67 L. Ed. 673.

New York v. *Consolidated Gas Co.*, 253 U. S. 219, 40 S. Ct. 511, 64 L. Ed. 870.

O'Connell v *Pacific Gas & Electric Co.* (C. C. A.), 19 F. (2d) 460.

Wright v. *Central Kentucky Natural Gas Co.*, 297 U. S. 537, 56 S. Ct. 578, 80 L. Ed. 850.

dents Wolpe et al. had any statutory right of action (D. C. zoning law, 1940 Ed. D. C. Code Title 5, Sec. 422, p. 145; Appendix p. 28). When they purchased their properties Wolpe et al. knew, or by inquiry (even by telephone), could have ascertained, that the whole of said Parcel had been zoned as an apartment house site as early as 1933 (R. 52).

> "An intervener should have some interest in or claim to the demand in suit, or some connection with, interest in, or lien upon the subject-matter of the litigation, and the appellant has none of these. * * * Appellant's claim is, in respect of the subject-matter of the suit, neither with nor against any of the parties, and in a legal sense it cannot be affected by the decree. It is so remote as not to have challenged the discretion of the trial court."
>
> *Glass* v. *Woodman*, 223 Fed. 621 (C. C. A. 8th 1915).

Since Wolpe et al. had no "interest" in the subject-matter of the action, the question of their "representation" in the action established no basis for intervention. But, in spite of this, the record shows that the Principal Assistant Corporation Counsel of the District of Columbia actively defended the action for the Zoning Commission (R. 30). The only complaint of respondents Wolpe et al. of alleged "inadequate" representation is that shortly after the suit was filed many of said respondents "offered their services to the Corporation Counsel's office in the trial of this case and in the giving of testimony, and were told that they would be called upon if needed," and that no request was made to them to assist (R. 63, 64). That is not the "inadequate" representation contemplated by F. R. C. P. 24 (a)(2).

> "Clause (2) of subdivision (a) relates to cases in which the applicant for intervention has an interest in the action represented by a party so that the applicant may be bound by a judgment in the action. The question of adequacy of representation does not arise unless the applicant is represented in the action. Neither Mokan, as a substantial stockholder of Pan-

handle Eastern, nor Panhandle Eastern, is represented by the United States. The interest of either of them will not be bound by a judgment on the supplemental complaint * * *. Petitioner has no right to encumber the main action which is being conducted by the Attorney General with extraneous issues of a private nature. United States v. Radio Corp., D. C. 3 F. Supp. 23, 25. United States v. Northern Securities Co., C. C. 128 F. 808, 813".

U. S. v. *Columbia Gas & Electric Corp.*, 27 F. Supp. 116, 119 (D. Del. 1939) app. dismd. 108 F. (2d) 614, cert. den. (1940) 309 U. S. 687, 60 S. Ct. 887, 84 L. ed. 1030.

But even "inadequate representation" alone is not sufficient to warrant intervention. F. R. C. P. 24 (1)(a) provides "*and* the applicant is or may be bound by a judgment in the action." Being (1) inadequately represented *and* (2) bound by the judgment are both required. Certainly Wolpe et al. could not have been bound by the judgment. That judgment vacated the order of November 7, 1941 of the Zoning Commission, enjoined the Zoning Commission from enforcing said order, and directed the restoration of the zoning existing prior to the date of said order (R. 56). The District Court found as a fact that the action of the Zoning Commission in rezoning Parcel 70/100 on November 7, 1941, as aforesaid, "was unreasonable, arbitrary, capricious and void and should be vacated and set aside" (R. 55). The Zoning Commission by its order of November 7, 1941 had unlawfully invaded the rights of petitioners Poretsky and Machen (R. 45, 53-55) in clear violation of the principles laid down by this Court in *Nectow* v. *Cambridge*, 277 U. S. 183, 72 L. ed. 842, and by the United States Court of Appeals for the District of Columbia in *Bugher* v. *Gottwals*, 60 App. D. C. 340, 341, 54 F. (2d) 451, and in *Hazen* v. *Hawley*, 66 App. D. C. 266, 272, 86 F. (2d) 217; and by the Circuit Court of Appeals of the 4th Circuit in *Radford Iron Co.* v. *Appalachian Electric Power Co.*, 62 F. (2d) 940. Therefore, the judgment

of the District Court could not possibly have been directed against or been binding upon anyone but the Zoning Commission, even if the respondents Wolpe et al. had been made original parties. Manifestly, therefore, F. R. C. P. 24 did not apply and could not legally be invoked.

> "The rule provides that, in exercising discretion as to intervention of this character, the Court shall consider whether intervention will unduly delay or prejudice the adjudication of the rights of the original parties. It is common knowledge that, where a suit is of large public interest, the members of the public often desire to present their views to the Court in support of the claim or the defense. To permit a multitude of such interventions may result in accumulating proofs and arguments without assisting the Court."
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> *Allen Calculators, Inc.* v. *National Cash Register Co.*, ... U. S. ...., 88 L. ed. Advance Opinions 874.

The application of the proposed intervenors, respondents Wolpe et al., was therefore properly denied because (1) they had no legal, direct or immediate interest in the subject matter of the main action; (2) their "interest" was general and public and was adequately represented by the Zoning Commission; (3) they were not bound by the judgment in the main action; (4) they had no claim or defense legally justiciable in the main action or presenting a question of law or fact in common with the matter involved in the main action; (5) their application for intervention was not timely; and (6) their said application would have and has unduly and improperly prejudiced the adjudication of the rights of the original parties by delaying the realization of the benefits of the judgment rendered and carried out before the application for intervention was filed.

If the Zoning Commission had originally denied the petition for rezoning, certainly Wolpe et al. would have had no legal right to file an action to compel a change of zoning

or to enjoin the decision of the Zoning Commission. The reason for this is apparent. Wolpe et al. had no control over the determinations of the Zoning Commission or any interest in the property affected by the zoning. Conversely the judgment rendered against the Zoning Commission did not bind Wolpe et al. Nor had they any legal right to appeal the judgment when the Zoning Commission, exercising the discretion vested in it alone by law, unanimously refused to take such an appeal (R. 75). No law or decision has been or can be cited authorizing the substitution of the decision of the proposed intervenors Wolpe et al. for the discretion and determination of the Zoning Commission in the matter of taking an appeal from a judgment rendered against it. There are over 150 persons in this case among the respondents Wolpe et al. but each has only a general or public interest, not the "legal interest" required by law as a prerequisite to intervention. The decision of the United States Court of Appeals for the District of Columbia held that each had such a "vital interest" as to entitle him to intervene as a matter of right under F. R. C. P. 24(a)(2) although these proposed intervenors expressly sought only permissive intervention under F. R. C. P. (24) (b) (2). But a general interest, a public interest, even a "vital interest" (R. 87) does not justify intervention.*

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* *Re Leaf Tobacco Board of Trade*, 222 U. S. 578, 581, 56 L. ed. 323, 32 Sup. Ct. Rep. 833;
New York v. *Consolidated Gas Co.*, 253 U. S. 219, 64 Law ed. 870, 40 Sup. Ct. Rep. 511;
New York v. *N. Y. Telephone Co.*, 261 U. S. 312, 67 Law ed. 673, 43 Sup. Ct. Rep 372.
San Antonio Utilities League v. *Southwestern Bell Telephone Co.*, 86 F. (2d) 584 (C. C. A. 5th, 1936).

II.

Analysis of the Opinion of the United States Court of Appeals for the District of Columbia.

The opinion of the United States Court of Appeals for the District of Columbia is inherently erroneous. The statement of the "question presented by the record," (R. 86) is inaccurate. It says that the proposed interveners were "adjoining property owners" when in fact the record shows that the Parcel involved in the main action consisted of a city block separated from surrounding property on three sides by public streets and abutting a public park on the fourth side (R. 46). The property of the nearest proposed intervener is situated diagonally across Seventeenth and Shepherd Streets in another city block and does not adjoin said Parcel. The properties of the other proposed interveners are even farther away, some of them two or more blocks distant from the Parcel aforesaid (R. 67). Also, the so-called question assumes, without any proof whatever, that the enforcement of the challenged zoning order of November 7, 1941 "affects the value or use" of the property of the proposed interveners, in spite of the finding of the trial court that "the erection of an apartment building under the Residential 60-foot 'A' area zoning would not affect adversely the residential characteristics of the Crestwood area or reduce land values in that section" (R. 52), and that "the erection of an apartment building upon this property would not impair the health, safety, morals, convenience, order, prosperity or general welfare of the surrounding area or the District of Columbia" (R. 55).

Section 10 of the Zoning Law of the District of Columbia (D. C. Code 1940, Title 5, Sec. 422) gives to "the corporation counsel of the District of Columbia or any neighboring property owner or occupant who would be specially damaged by any such violation" of the zoning law a right of action to prevent or abate a violation of said Zoning Act.

In the instant case there was no violation of said Zoning Act. Therefore, no statutory or other right of action arose in favor of the respondents Wolpe et al. The court below ignores the fact that there was no violation of the zoning law but, basing its opinion nevertheless upon Title 5, Sec. 422, aforesaid, says "their right to bring that independent action is the basis of appellants' (respondents here) right to intervene in this case." In support of this position the Court says in a footnote (R. 86) "Such a right was allowed by this Court prior to the present Zoning Act. *Hazard* v. *Blessing*, 55 App. D. C. 114, 2 F. (2d) 916 (1924)." The fact is that the zoning law was passed in 1920 and *Hazard* v. *Blessing* was decided four years thereafter in 1924, and the decision in that case *was* predicated upon a *violation* of the zoning law. That case is, therefore, no authority for the position taken by the court below in the present case.

Upon the foregoing erroneous premise the court said (R. 86): "It follows from Rule 24 (a) that appellants (respondents Wolpe et al.) may intervene as of right in this case provided (1) that the representation of their interest by the Zoning Commission is or may be inadequate, and (2) that their application is timely." This is a definite misconstruction of F. R. C. P. 24 (a) (2), which provides that intervention of right shall be permitted "when the representation of the applicant's interest by existing parties is or may be inadequate *and the applicant is or may be bound by a judgment in the case.*" (Italics supplied.) Representation and timeliness are not joined, but being represented and being bound by the judgment are.

> *Allen Calculators, Inc.* v. *National Cash Register Co.*, ... U. S. ...., 88 L. ed. Advance Opinions 874, 876.

To support its position that Wolpe et al. "may intervene as of right" the court below cites *U. S.* v. *Lane Lifeboat Co.*, 25 F. Supp. 410 (1938). But the facts in that case disclose the following situation: The United States entered

into contracts with the defendant Lifeboat Co. for lifeboats. The defendant Hartford Accident and Indemnity Co. executed performance bonds in favor of the Government for the manufacture of the lifeboats, and the Lifeboat Co. and the Indemnity Co. undertook to hold the Government harmless of any liability resulting from the purchase of the lifeboats, including any liability that might arise from the embodiment therein of a patented invention. The Government sued the Lifeboat Company and the Hartford Company to recover damages paid by it for an alleged patent infringement. Krolman, the president of the Lifeboat Co., had as an individual executed an indemnity agreement to indemnify the Hartford Co. for any moneys which it might be required to pay as a consequence of having executed the bonds. Krolman sought to intervene in the main action. The court said that it was "clear that any judgment rendered against the insurance company would enable the insurance company to proceed against its indemnitors", and that Krolman as an indemnitor would be ultimately bound by the judgment against the insurance company. Because of conflict between Krolman and the attorney for the Lifeboat Co. the Court also found that Krolman's interest was inadequately represented. In law, in fact and in principle the Lifeboat case does not support the position of the United States Court of Appeals for the District of Columbia in the present case.

That court also held that "the failure of the Zoning Commission to take an appeal clearly indicates that its representation of the interest of the interveners was inadequate" (R. 87). Again the court below, it is respectfully submitted, is in error. The determination to take an appeal rested exclusively in the discretion of the Zoning Commission, and in reaching its decision not to appeal it was unanimous, although it had passed its challenged rezoning order of November 7, 1941 by a three to two vote. What could be more within the discretion of an administrative body such as the Zoning Commission than to refuse to take an appeal

from a solemn judgment of the District Court entered after full trial? It is obvious that the Zoning Commission realized that a majority of its members had committed an error in attempting to change the zoning of said Parcel. It certainly had the right to restore a prior existing zoning after the District Court had pointed out that the Zoning Commission's order of November 7, 1941 was "unreasonable, arbitrary, capricious and void" (R. 55).

F. R. C. P. 24 (a)(2) provides that the applicant must not only show inadequate representation but also that he would be bound by the judgment. No such showing is made in this case. "The question of adequate representation does not arise unless the applicant is represented in the action."

U. S. v. *Columbia Gas & Electric Corp.*, *supra*, p. 13

That is, that the applicant must have a legal, direct and immediate interest as distinguished from a general and public interest and must be bound by the judgment.

The court below held further (R. 87) that "Intervention may be allowed after a final decree where it is necessary to preserve some right which cannot otherwise be protected." That holding is directly opposed by the many decisions of this Court as shown in Section III of this brief. *U. S. Casualty Co.* v. *Taylor*, 64 F. (2d) 521, 527 (C. C. A. 4th 1933), cited in the opinion below to support the court's holding, was a case under the Longshoremen's Act (33 U. S. C. A. 901-950) and the applicant for intervention therein was the employer's insurance carrier, which had been a party to the proceedings before the deputy commissioner, and would have been bound by the judgment rendered against said employer, although it was not a technical party. "The District Court vacated the decree and granted the petition, making the casualty company a party defendant upon condition that it adopt the answer of the deputy commissioner and be bound by the testimony that had been taken. Thereafter a formal decree was entered, whereby the prior de-

cree was confirmed against the deputy commissioner and the casualty company" (p. 525). The Circuit Court of Appeals sustained the order of intervention under Equity Rule 37 (28 U. S. C. A. Sec. 723) which permitted intervention at any time. In that case the judgment had not been carried out, the intervener did not seek to "prejudice the adjudication of the rights of the original parties," but actually submitted itself to the judgment of the court. In the case at bar the proposed interveners were mere interlopers.

The reasoning and theory of the opinion of the court below is manifestly derived from the case of *Rosenberg* v. *Mehl*, 37 Ohio App. 95, 174 N. E. 152 (1930) (R. 87). But that case depended upon a statute providing that "any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff or who is a necessary party to a complete determination or settlement of a question involved therein." There is no such statutory authority for intervention in the District of Columbia. Furthermore, in the Rosenberg case a violation of the zoning law was involved, while no such violation exists in the case at bar. The rights of neighboring property owners who are specially damaged are limited by the zoning law of the District of Columbia (D. C. Code 1940, Title 5, Sec. 422) to cases in which a violation of the zoning law is involved. That was not true in the Rosenberg case.

In the Ohio case Rosenberg's property was "contiguous" to that of the plaintiff Mehl. The properties of none of the respondents Wolpe et al. adjoin or are contiguous to the Parcel involved in the instant case. Contiguity was deemed so essential in the Ohio case that although a group of the neighbors had sought intervention, the court limited to Rosenberg the right to be made a party because only his property was contiguous to that of the plaintiff Mehl.

Therefore, even under the Ohio case, which underlies the opinion of the court below, two basic elements existed which do not exist in the case at bar: (1) contiguity and (2) a violation of the zoning law.

Finally the court below declared (R. 87) that "had the intervention been permissive we think it would have been an abuse of discretion to deny it under the circumstances of this case. *Adjoining* property owners in a suit to vacate a zoning order have such a *vital interest* in the result of that suit that they should be granted permission to intervene as a matter of course unless compelling reasons against such intervention are shown." (Italics supplied.) The "compelling reasons" appear in F. R. C. P. 24, in the Zoning Act, and in the fact that none of the proposed interveners were "adjoining property owners." No "vital interest" is recognized under the established law or the Federal Rules of Civil Procedure.

III.

The Denial of Respondents' Application for Permissive Intervention was Within the Discretion of the District Court and was Not Appealable.

The motion of respondents Wolpe et al. was grounded solely upon "Permissive Intervention" F. R. C. P. 24 (b) (2), (R. 57). Nevertheless the United States Court of Appeals for the District of Columbia held that the motion should have been based upon F. R. C. P. 24 (a) (2), (R. 87), "Intervention of right." That this was clearly erroneous has been shown. But aside from the fact that the alleged "claim or defense" of Wolpe et al. and the main action did not and could not present a "question of law or fact in common," the United States Court of Appeals for the District of Columbia was confronted with but disregarded the established rule of this Court that an order denying leave to intervene is not appealable.

Allen Calculators, Inc. v. *National Cash Register Co.*, ... U. S. ...., 88 L. ed. Advance Opinions 874.

In *United States* v. *California Co-op Canneries*, 279 U. S. 553, 556, 73 L. ed. 838, 841, 49 Sup. Ct. Rep. 423, the court said:

"The supreme court denied leave to intervene. The Canneries appealed to the court of appeals. That court, so far as appears, did not consider the question whether, in view of the Expediting Act, it had jurisdiction on appeal. *It did not refer to the decisions which hold that an order denying leave to intervene is not appealable* (Ex parte Cutting, 94 U. S. 15, 24 L. ed. 49; Credits Commutation Co. v. United States, 177 U. S. 311, 44 L. ed. 782, 20 Sup. Ct. Rep. 636; Re Leaf Tobacco Board of Trade, 222 U. S. 578, 581, 56 L. ed. 323, 32 Sup. Ct. Rep. 833; Re Engelhard & Sons Co., 231 U. S. 646, 58 L. ed. 416, 34 Sup. Ct. Rep. 258; New York v. Consolidated Gas Co., 253 U. S. 219, 64 L. ed. 870, 40 Sup. Ct. Rep. 511; New York v. New York Teleph. Co., 261 U. S. 312, 67 L. ed. 673, 43 Sup. Ct. Rep. 372), except where he who seeks to intervene has a direct and immediate interest in a res which is the subject of the suit (compare French v. Gapen, 105 U. S. 509, 524-526, 26 L. ed. 951, 956, 957; Smith v. Gale, 144 U. S. 509, 36 L. ed. 521, 12 Sup. Ct. Rep. 674; Leary v. United States, 224 U. S. 567, 56 L. ed. 889, 32 Sup. Ct. Rep. 599; Swift v. Black Panther Oil & Gas Co., 156 C. C. A. 448, 244 Fed. 20, 30). Nor did it refer to the *settled rule of practice that intervention will not be allowed for the purpose of impeaching a decree already made.*" (Italics supplied)*

In *San Antonio Utilities League* v. *Southwestern Bell Telephone Company*, 86 F. (2d) 584 (C. C. A. 5th, 1936), the Telephone Company had sued the City of San Antonio, Texas, et al., in contested litigation over telephone rates. The litigation had continued over years and on the day the parties to the main action submitted to the Court a consent decree, the League, purporting to represent five

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* *Smith* v. *Gale*, 144 U. S. 509, 520, 36 L. Ed. 521, 524, 525, 12 Sup. Ct. Rep. 674.
American Book Co. v. *Kansas*, 193 U. S. 49, 52, 48 L. Ed. 613, 614, 24 Sup. Ct. Rep. 394.
United States v. *Northern Securities Co.*, 128 Fed. 808, 810.
Board of Drainage Com'rs. v. *Lafayette Southside Bank*, 27 F. (2d) 286, 293 (C. C. A. 4th, 1928).
Radford Iron Co. v. *Appalachian Electric Power Co.*, 62 F. (2d) 940 (C. C. A. 4th, 1933).

thousand or more telephone subscribers, made an unsuccessful attempt to intervene in the suit in order to oppose the entry of the consent decree. The application for intervention was denied, and the appeal therefrom dismissed.

"Appellees, urging that the order was discretionary and not appealable, have moved on the authority of In re Englehard & Sons, 231 U. S. 646, 34 S. Ct. 258, 58 L. Ed. 416; City of New York v. New York Tel. Co., 261 U. S. 312, 43 S. Ct. 372, 67 L. Ed. 673; New York v. Consolidated Gas Co., 253 U. S. 219, 40 S. Ct. 511, 64 L. Ed. 870; O'Connell v. Pacific Gas & Electric Co. (C. C. A.) 19 F. (2d) 460, and Wright v. Central Kentucky Natural Gas Co., 297 U. S. 537, 56 S. Ct. 578, 80 L. Ed. 850 to dismiss the appeal.

Appellants, recognizing the general rule to be that an order denying leave to intervene is a discretionary order, and therefore not a final one from which an appeal will lie, insist that their case is one of, and their motion presents, exceptional circumstances, taking the order appealed from here out of that rule.

We do not think so. *To the thoroughly settled rule that an order denying leave to intervene is not appealable,* In re Cutting, 94 U. S. 14, 15, 24 L. Ed. 49; Credits Commutation Co. v. United States, 177 U. S. 311, 20 S. Ct. 636, 44 L. Ed. 782, there is only one substantial exception, that he who seeks to intervene has a direct and immediate interest in *a res* which is the subject of the suit. United States v. California Cooperative Canneries, 279 U. S. 553, at page 556, 49 S. Ct. 423, 73 L. Ed. 838; Lupfer v. Carlton (C. C. A.) 64 F. (2d) 272; Burrow v. Citizens' State Bank (C. C. A.) 74 F. (2d) 929, 930. That, generally speaking, individual subscribers have no direct and immediate interest in a rate controversy and suit sufficient to authorize them to maintain or prosecute it, and that the matters involved in such a suit are matters entirely between the parties to it, the Utilities and the City, is settled by the authorities first above cited. (Italics supplied)

Demulso Corp. v. *Tretolite Co.*, 74 F. (2d) 805 (C. C. A. 10th 1934).

White v. *Hanson,* 126 F. (2d) 559 (C. C. A. 10th 1942).

Baltimore Trust Co. v. *Interocean Oil Co.*, 30 F. Supp. 484, 485.

See also *Land Title & Trust Co.* v. *Asphalt Co.*, 127 Fed. 1, 21 (C. C. A. 3d, 1903).

IV.

The Denial by the District Court of the Motion of Respondents Wolpe et al. for Leave to Intervene Was Not an Abuse of Its Discretion.

The motion of respondents Wolpe et al, for leave to intervene was filed *after* the judgment in the main action had been rendered and carried out by the defendant Zoning Commission and *after* the time had expired within which a motion for a new trial could be made or an appeal could be taken. That motion expressed two objects: 1, a new trial in the main action or, in the alternative, 2, to be allowed to appeal the judgment (R. 57).

1. As to the motion for a new trial in the main action, it need only be said that the final judgment in the main action had been entered April 7, 1943 (R. 55). F. R. C. P. 59 (b) limits the time for serving a motion for a new trial to ten days after the entry of judgment. Therefore, after April 17, 1943 a motion for a new trial was too late. The motion of respondents Wolpe et al. was filed May 6, 1943 (R. 57) and was *not* accompanied by a proposed intervening petition as required by F. R. C. P. 24 (c). A proposed intervening petition was filed May 8, 1943 (R. 57), a day after the time to appeal had expired under Rule 10 of the then existing General Rules of the United States Court of Appeals for the District of Columbia. (Appendix p. 29) Obviously the Court could not have entertained that motion for leave to intervene for the purpose of moving for a new trial. The opinion of the District Court expressly so decided (R. 77). That the motion for a new trial was not timely is apparently conceded by said respondents.

But in addition to this the trial court decided as a fact that aside from the limitation imposed by the F. R. C. P. 59 (b), the motion for a new trial "would have been overruled on its merits" (R. 77). The Court had recently completed the trial of the main action. He had made a personal inspection of the property involved and of the neighborhood. He had found "nothing stated in the intervening petition that would change my (his) views of the case even if the interveners were made parties to the suit" (R. 77). The exercise of the Court's judgment in this regard is manifestly not an abuse of discretion.*

2. The denial of the leave to appeal the judgment was properly, because (1) the movants Wolpe et al. had no legal interest in the property involved in the main action; (2) the motion was not timely;[1] (3) the final judgment had been entered and performed; (4) the Zoning Commission was the only authority vested in law with the determination of the question whether an appeal should be taken and it had unanimously decided not to appeal; (5) the motion sought to impeach said final judgment in the main action.

In *U. S. v. Columbia Gas & Electric Corp., supra,* (p. 13 hereof) the Court said:

> "It is improbable that the Supreme Court in promulgating this new rule intended to destroy well established principles as the basis of intervention as of right. It would produce chaos to require the courts to recognize the absolute right to intervention of stran-

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* *Rich* v. *Lemmon*, 15 App. D. C. 507, 509.
Ecker v. *Potts*, 72 App. D. C. 174, 112 F. (2d) 581.
American Brake Shoe & Foundry Co. v. *Interborough Rapid Transit Co.*, 112 F. (2d) 669, 670 (C. C. A. 2d, 1940).
Palmer v. *Guaranty Trust Co.*, 111 F. (2d) 115, 117 (C. C. A. 2d, 1940).

[1] See Rule 10, General Rules, U. S. Ct. App. D. C., Appendix p. 29).

gers who had no legal or equitable interest in the subject matter of the action."

O'Connell v. *Pacific Gas & Electric Co.*, 19 F. (2d) 460 (C. C. A. 9th)

CONCLUSION.

F. R. C. P. 24 was not intended to take away from an administrative body like the Zoning Commission of the District of Columbia (1) the control of litigation in which it is a party, or (2) its discretion relating to an appeal from a judgment against it. Without a violation of the zoning law, which in and of itself defines the rights of neighboring property owners specially damaged by such violation, the proposed interveners have no legal rights or interests entitling them to intervene under the comprehensive inventory of allowable instances for intervention provided in F. R. C. P. 24. The Zoning Act vests in the Zoning Commission guardianship of the interests of the proposed interveners, and after the Zoning Commission determines that no appeal is to be taken and that it will carry out the judgment of the court, no application for intervention is timely or warranted. Further, respondents' application for leave to intervene came too late.

The writ of certiorari should be granted.

All of which is respectfully submitted.

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APPENDIX.

Zoning Act for the District of Columbia of March 1, 1920, 41 Stat. 500, amended by Act of June 30, 1938, 52 Stat. 797, 800, Code of the District of Columbia, 1940 Edition, Title 5, Section 412 et seq.

Title 5—Sec. 412

Zoning Commission created—Membership—

To protect the public health, secure the public safety, and to protect property in the District of Columbia there is hereby created a Zoning Commission, which shall consist of the Commissioners of the District of Columbia, Director of the National Park Service and the Architect of the Capitol, which said commission shall have all the powers and perform all the duties hereinafter specified and shall serve without additional compensation. * * *

Title 5—Sec. 413

Zoning regulations to be made by Zoning Commission—Uniformity.

To promote the health, safety, morals, convenience, order, prosperity, or general welfare of the District of Columbia and its planning and orderly development as the national capital, the Zoning Commission created by section 5-412, is hereby empowered, in accordance with the conditions and procedures specified in sections 5-413 to 5-428, to regulate the location, height, bulk, number of stories and size of buildings and other structures, the percentage of lot which may be occupied, the sizes of yards, courts, and other open spaces, the density of population, and the uses of buildings, structures, and land for trade, industry, residence, recreation, public activities, or other purposes; and for the purpose of such regulation said commission may divide the District of Columbia into districts or zones of such number, shape, and area as said Zoning Commission may determine, and within such districts may regulate the erection, construction, reconstruction, alteration, conversion, maintenance, and uses of buildings and structures and the uses of land. All such regulations shall

be uniform for each class or kind of building throughout each district, but the regulations in one district may differ from those in other districts.

Title 5—Sec. 414

Purposes of zoning regulations.

Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the street, to secure safety from fire, panic, and other dangers, to promote health and the general welfare, to provide adequate light and air, to prevent the undue concentration of population and the overcrowding of land, and to promote such distribution of population and of the uses of land as would tend to create conditions favorable to health, safety, transportation, prosperity, protection of property, civic activity, and recreational, educational, and cultural opportunities, and as would tend to further economy and efficiency in the supply of public services. Such regulations shall be made with reasonable consideration, among other things, of the character of the respective districts and their suitability for the uses provided in the regulations, and with a view to encouraging stability of districts and of land values therein. * * *

Title 5—Sec. 422

Building permits—Construction without obtaining—Certificates of occupancy—Use without obtaining—Construction in violation of regulations—Enforcement—Actions, parties—Penalty.

It shall be unlawful to erect, construct, reconstruct, convert, or alter any building or structure or part thereof within the District of Columbia without obtaining a building permit from the inspector of buildings, and said inspector shall not issue any permit for the erection, construction, reconstruction, conversion, or alteration of any building or structure, or any part thereof, unless the plans of and for the proposed erection, construction, reconstruction, conversion, or alteration fully conform to the provisions of section 5-413 to 5-428 and of the regulations adopted under said sections. * * * The corporation counsel of the District of Columbia or any neighboring property-owner or occu-

pant who would be specially damaged by any such violation may, in addition to all other remedies provided by law, institute injunction, mandamus, or other appropriate action or proceeding to prevent such unlawful erection, construction, reconstruction, alteration, conversion, maintenance, or use, or to correct or abate such violation or to prevent the occupancy of such building, structure, or land. * * *

General Rules of the United States Court of Appeals for the District of Columbia.

Rule 10. Time for Taking Appeals from District Court.

(a) From Final Judgments. Except in criminal cases (see Rule 33) and bankruptcy cases (see Rule 34), no final order or judgment of the District Court of the United States for the District of Columbia, or of any justice thereof, shall be reviewed by this court unless the appeal shall be taken within 30 days after the order or judgment complained of shall have been entered. (Amended January 7, 1944, allowing appeal within three months after entry of judgment.)

(10)

No. 579.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

HARRY PORETSKY, ARTHUR W. MACHEN, Trustee, and THOMAS MACHEN,
Petitioners,

vs.

JULIUS H. WOLPE ET AL., and CHARLES W. KUTZ ET AL., as Members of the Zoning Commission of the District of Columbia,
Respondents.

OPPOSING BRIEF OF RESPONDENTS, JULIUS H. WOLPE ET AL., TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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OPPOSING BRIEF OF RESPONDENTS, JULIUS H. WOLPE ET AL., TO PETITION FOR WRIT OF CERTIORARI

Concise Statement of Case

The judgment of the Appellate Court reversed the District Court and remanded the cause for further proceedings (Rec. 88).

The petitioner, Poretsky, brought suit to enjoin members of the Zoning Commission from carrying into effect a zoning order, which prohibited an apartment house at the corner of 16th and Shepherd St., N. W. The trial court

found the action of the Zoning Commission arbitrary, capricious and void (Rec. 55), and enjoined it (Rec. 56). Wolpe et al. were not parties to this proceeding.

These parties would have been seriously injured by the proposed erection of the apartment house on the land rezoned, and filed a motion for leave to intervene for the purpose of moving for a new trial, or, in the alternative, for the purpose of taking an appeal (Rec. 57).

The trial court denied the motion for intervention (Rec. 78), and the Court of Appeals reversed this order (Rec. 87).

Further Statement of Case

The petitioner, Poretsky, was the plaintiff in the trial court. He alleged himself to be a contract purchaser (not title owner) of parcel 70/100 in the City of Washington, District of Columbia, located at the southwest corner of 16th and Shepherd Streets, N. W. (page 3, petition for certiorari, 13-14 and 15 of record).

He desires to build an apartment house on such site, and brought this proceeding to compel the Zoning Commission to change its zoning so that he could do so. The respondents, Wolpe et al., are the owners of residences located west and north of parcel 70/100, the Piney Branch Parkway arm of Rock Creek Park being to the south and east.

The relative locations of the parties are shown by a diagram (Rec. 67).

If the judgment of the trial court stands, the erection of an apartment house will be permitted at the corner of 16th and Shepherd Streets, that will utterly destroy the esthetic features and impair the financial value of the homes owned by the respondents.

The members of the Zoning Commission were the defendants in the original proceeding. The Corporation Counsel and his assistants appeared for them.

Leave to intervene was sought by and granted to Arthur W. Machen, trustee, and to Thomas Machen, who were

vendors to Poretsky. They adopted the allegations of the plaintiff, and prayed for a similar judgment (Rec. 27). Their interest in the trial was hostile to the interests of these respondents.

Representatives of the respondents had offered to the Corporation Counsel their services in defending the action. He did not avail himself of that offer. Without the knowledge of or consultation with the respondents, a stipulation of facts was signed by the Corporation Counsel, which was erroneous. The case was then tried without a conference with the respondents, and not one of these respondents was called as a witness by the Corporation Counsel (Rec. 57 to 65).

Following that trial, the court wrote an opinion (Rec. 44-46) and subsequently entered findings of fact (Rec. 46 to 55) and judgment (Rec. 56). This judgment would ruin the present residential character of the neighborhood.

These respondents sought to intervene (Rec. 57 et seq.), and on May 6, 1943, filed a motion for leave to intervene, accompanied by a copy of petition to intervene. (See stipulation of appendix.)

The prayers of the petition were that the judgment of April 7, 1943, be vacated and held for naught, and that the petitioners be granted a new trial of the issues, or, in the alternative, that petitioners be granted the right to intervene for the purpose of appealing said cause, and that the original parties be required to deposit the necessary exhibits and record to effectuate an appeal (Rec. 64 and 65). The motion for leave to intervene was denied by the trial court on May 21, 1943 (Rec. 78), and this order was reversed by the Court of Appeals, and the cause remanded for further proceedings in the District Court.

The trial court held, in the findings of fact, that the action of the Zoning Commission in rezoning parcel 70/100 on November 7, 1941, was "unreasonable, arbitrary, capricious and void and should be vacated, set aside and held for naught" (Rec. 55).

This finding may be regarded as basic.

In order to illustrate the nature of the finding, the National Park and Planning Commission has furnished these respondents certain zoning maps, copies of which are attached hereto, demonstrating the facts, either as shown in the evidence, or which will be shown in the evidence more clearly by these respondents, if they are permitted to offer testimony.

Map I shows zoning on February 1, 1926, at a time when the area in which the respondents' homes are located, known as the Crestwood area, was totally undeveloped.

The court will note that as of that date only a strip along the 16th Street side of 70/100 was zoned to permit an apartment house, and that such apartment house site was in area C—not A. The court will also notice that as of that time Piney Branch Parkway had not been enlarged, so as to abut on the parcel in question, nor extended to the west of the parcel in question, nor has it been extended east of 16th Street.

Map II shows the zoning status as it was on November 7, 1941, as the result of the action of the Zoning Commission, which the court below subsequently held arbitrary and capricious.

The court will note that as of that date, Piney Branch Parkway had been enlarged, so that it abutted parcel 70/100. The court will also note that Piney Branch Parkway had been enlarged as of that date to the east side of 16th Street, and that no apartment house was permitted by law to be erected either on the east or west side of 16th Street north of Piney Branch Parkway, except in the small triangle made by 16th Street and Arkansas Avenue, where it was impracticable to erect an apartment house, even if this site had properly been zoned for an apartment house. (Par. 21 Proposed Intervening Petition, Rec. 60-61.)

Map III shows the situation on April 7, 1943, which was created by the judgment of the trial court (Rec. 56). Parcel 70/100 is there zoned A, thereby permitting the erection of an apartment house in a single family dwelling area.

This is "spot zoning," which does violence to the fundamental principles of zoning.

The only areas shown on the maps where an apartment house may be erected are A (colored purple), B (colored orange), C (colored blue). Zone D is not involved in any property shown on the maps. Zone B (colored orange) is already completely built up, as is shown by proposed intervening petition (Rec. 61). Under the zoning regulations, apartment houses cannot be built in A-Restricted, A-Semi-Restricted, or B-Restricted areas.

These facts do not seem to have been clearly presented to the trial court, as they might have been, by the original defendants, and this is one of the reasons why these respondents sought to intervene.

Prior to the changing of zoning 70/100 in 1941, a minority report was filed by the Zoning Advisory Council, in which it was said, "The present apartment house zoning of this 2.07-acre tract at 16th and Shepherd is by no stretch of the imagination a part of any comprehensive plan as the zoning law required. It is in fact an outstanding case of 'spot zoning' and constitutes an opening wedge for further apartment house zoning north of this point." The entire minority report is attached hereto (Exhibit IV) as an indication of what the respondents can show if they are permitted to offer evidence in the trial court. John Nolen, Jr., who signed the report, is director of planning for the National Capital Park and Planning Commission.

On April 19, 1943 (after the decision in the trial court), the National Capital Park and Planning Commission wrote a letter to the Zoning Commission, in which it said, "In the opinion of the Commission, this decision constitutes a definite threat to the principles of comprehensive zoning and city planning, and to the powers of the Zoning Commission to make changes in the zoning plan from time to time as conditions change in the various parts of the city. The Commission urges that all practical means be adopted to obtain a reversal of this decision."

Copy of this letter is attached as Exhibit V. The respondents proffer to prove the facts related in this letter, if they are permitted to offer evidence. The stenographic record of the testimony in the trial court has never been made available to these respondents, because of the refusal of counsel for Poretsky to accede to their demands for a copy, although they paid for it (Rec. 64).

The Situation of the Parties on the Record

The contract by which Poretsky purchased the property has certain parts deleted (Rec. 13). The deleted part read, "And that said property is now zoned 60-A area and will continue to be zoned as such until date of settlement, otherwise, this offer shall be null and void and deposit shall be returned to purchaser" (Rec. 26 and 42). It seems a fair comment to say that this deletion was because Poretsky knew there was likelihood of a controversy about the zoning, and bought the property on a chance. Nowhere in the pleadings is it contended that he ever complied with his contract and completed the purchase in accordance with it.

The Machen intervening petition explained this deletion as follows:

> "The Petitioners, however, insisted upon striking out said clause, as was done before the contract was executed. They told the purchaser that he must satisfy himself as to the zoning" (Rec. 26).

The court may readily find from these facts, it is submitted, that Poretsky took a chance on the zoning, and now, aided and abetted by the Machens, seeks to capitalize that chance at the expense of the neighboring property owners and to the detriment of the orderly development and planning of the nation's capital.

The petition for certiorari (pages 3 and 4) states that the motion for leave to intervene was not accompanied by the proposed intervening petition, but the said petition

was filed on May 8, 1943. The printed record shows May 8th. Nothing was said by the petitioners in the briefs in the Court of Appeals or in the argument about this date, or else their attention would have been called to the fact that this date is a printer's error, caused by the indistinctness of the rubber stamp imprinting the filing date on the record. The motion for leave to intervene (Rec. 57) recites, "This motion is accompanied by petition setting forth the claim of these petitioners," and the docket in the trial court shows that the petition was filed along with the motion, and that its date was May 6. The attention of counsel for Poretsky has been called to this error, and counsel preparing this brief is happy to include as Exhibit VI hereto a stipulation reached with counsel for the other parties showing that the correct date of filing the petition for intervention was May 6, 1943.

The Right to Intervene

Much of the argument of the petitioners is based on the theory that it was necessary for respondents to have some ownership interest in the property in parcel 70/100, or that their property be adjoining or contiguous, and that without such ownership or adjoining or contiguous property, the respondents would have no interest sufficient to enable them to intervene.

Respondents respectfully submit that this is a strained construction of the law. The fact that 17th Street separated the properties of the respondents from the proposed apartment site does not make the proposed apartment house less objectionable than it would be if it were in the same block. Of course the respondents could not be in the same block, because 70/100 occupies the entire block.

If only a person with abutting property had a right to be heard in a zoning matter, then it would be possible for the owner of three adjoining lots to make whatever use

he chose of the center lot. The absurdity of such a position is apparent.

The appellate court answered this contention with a number of cases cited (R. 87) where the question of the right to intervene was considered under various phases where there was no ownership or adjoining or contiguous property in the sense in which petitioners have used those terms.

That these respondents have an interest is proved by the acts of Congress relating to zoning for the District of Columbia, in offering them an opportunity to be heard in any zoning case before the Zoning Commission and in giving them a right to enjoin any violation, etc.

The Court of Appeals made a careful analysis of the zoning law in determining the right of Wolpe et al. to intervene (Rec. 86 and 87). The respondents do not believe there is any need to burden this court by adding to it.

The petitioners say, with respect to F. R. C. P. 24, "The basic principle underlying the rule is that the intervener shall have a direct and immediate legal interest in the property which is the subject matter of the action."

This Court said in *Security and Exchange Commission* v. *United States Realty and Improvement Co.*, 310 U. S. 459, 84 L. Ed. 1306, in speaking of F. R. C. P. 24:

> "This provision plainly dispenses with any requirement that the intervener shall have a direct personal or pecuniary interest in the subject of the litigation."

The petitioners seem to be in conflict with the doctrine of this court on this subject.

The petitioners rely on *U. S.* v. *California Co-operative Canneries*, 279 U. S. 553, 73 L. Ed. 838 (cited in petition, pages 7-9-21) as embracing contrary doctrine. This case was decided by this court before the passage of the Federal rules, and the only part germane to this controversy is a statement to the effect that the court below did not refer to

the decisions which hold that an order denying leave to intervene is not appealable, except where he who seeks to intervene has a direct and immediate interest in the res which is the subject of the suit. That does not seem to these petitioners to meet the issue here, for the question arises, "What is the res?" It certainly need not be a proprietary or titular right. The res in the case at bar is not the ownership of the property, for indeed Poretsky has not such ownership. He claims the right as a contract purchaser to erect an apartment house in contravention of the rights of the public and in contravention of the rights of these respondents.

The *Canneries* case was one under the anti-trust act, while the present is under the Zoning Law of the District of Columbia. Whatever else may be said about it, it remains that the case was before the present Federal rules were adopted, and did not establish that the res was not the thing or right which these respondents claim.

There is no property right in a zoning status, and neither Poretsky nor the Machens could deprive the government of its police powers, including the power to rezone real estate.

A zoning status is not the equivalent of a covenant running with the land. The Machens, owners of 70/100, can not say that the Zoning Commission would have been powerless to change the zoning of the property because it was zoned A-60 in 1933. Can Poretsky, who contracted to buy the land with the expectation that the zoning status would remain unchanged, successfully urge that it must remain unchanged? The first thing Poretsky did was to try to increase the use of the property over the use permitted by the zoning, and to have an eight-story apartment approved (R. 21). But before that he recognized the possibility of change of zoning, and tried to protect himself by his contract, but the vendors, his co-petitioners now, made Poretsky take the gamble (Rec. 26).

The petitioners also urged *Allen Calculators* v. *National Cash Register Co.*, decided by this Court on May 1, 1944 (petition and brief pages 7-9-14-17 and 21).

The Allen Calculators, Inc., had what the respondents in this case never had, i. e., opportunity to be heard.

This is clear from the following excerpts from the case:

> "Before making his ruling, he was advised, in answer to his inquiry, that the president of the appellant would be called as a witness by the Government. * * *
>
> "The record here discloses that the parties produced all data they and the court thought was available upon the issues in the case. Moreover, the court invited the Government to call the appellant's president to testify as to his knowledge concerning the issues. * * *
>
> "Where, as here, examination of the entire record leading to the court's final order discloses that the issues were thoroughly explored and that the parties were adequately represented, the action of the court denying intervention should not be reviewed."

It is respectfully submitted that the *Allen Calculators* case is not parallel to the case at bar.

The petitioners rely upon *Nectow* v. *Cambridge*, 277 U. S. 183, 72 L. Ed. 842 (Petition and Brief, pages 3 and 13). An inspection of the maps attached hereto will differentiate this case. The building of an apartment house in an otherwise entirely residential section surely has a substantial relation to the public health, safety, morals or general welfare, spoken of in the case cited. This court was aware of the ruinous effects of apartment houses, as it brought out in the case of *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 71 L. Ed. 303, from which the following is quoted:

> "With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a

mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings, created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities—until finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances."

The court can readily imagine the living room of Maudlin (Rec. 59) facing the back of an apartment house from which is removed the garbage and trash and where the service entrance is contained. The situation as described in the Ambler case above is doubly accentuated in the case of those living on Crestwood Drive. (Rec. 67)

The effect of the judgment of the trial court is to permit an apartment house on 16th Street, north of Piney Branch Parkway, which is the natural dividing line between the multi-family dwelling area to the south and the single family dwelling area to the north. No other apartment house is permitted on 16th Street in the nearly four-mile stretch between Piney Branch Parkway and the District line to the north, except on a small triangle (Rec. 61) which is not large enough for a practical apartment house. The District of Columbia is the capital of the United States, and, in a sense, the capital of the whole world. Beauty and order are important here, and the comprehensive plan of the National Capital Park and Planning Commission for the

development of 16th Street north of Piney Branch Parkway as a residential area should not be frustrated by permitting the erection of an apartment house at the corner of 16th and Shepherd Streets.

In the cited case, *Nectow* v. *Cambridge,* there was a large auto assembly plant south of the locus in question. A soap factory and the tracks of a railroad were near. This court held that the site in question should not be subjected to greater restriction.

In the present case all the area abutting 16th Street is residential north of Piney Branch Parkway, which is a natural boundary. To favor 70/100 with less restriction would afflict the area with a creeping malignancy.

The prayers of the complaint (Rec. 12) not only do an injustice to these respondents, without a hearing, but to the comprehensive plan for zoning of the entire city. (See Map III hereto attached.)

The case of *Russell Sage* v. *Central Railroad Co. of Iowa,* 93 U. S. 412, 23 Law. Ed. 933, represents an instance where intervention was allowed for the purpose of taking an appeal.

> "The appellants were permitted to intervene, but only for the purpose of an appeal. It would have been within the power of the court to set aside the old decree and enter it over again; but this was refused. Leave only was granted to appeal from the decree as originally rendered. * * * The appellants, by the order of January 14th, became parties to the suit for the purposes of an appeal. This order, having been made at the same term in which the decree was entered, was within the power of the court; and although it does not appear whether they were admitted as plaintiffs or defendants, it was sufficient to enable them to prosecute an appeal for the protection of their interests."

The order of January 14, referred to above, was the order permitting Russell Sage et al. to intervene and to prosecute an appeal.

St. Louis and San Francisco Railroad v. *Spiller,* 274 U. S. 304, 71 Law Ed. 1060, presents an analogous situation. In 1913 the Federal Court appointed receivers for a railroad. In 1916 the system was sold. In 1920 Spiller recovered a judgment in the Federal Court for $30,000.00.

> "Thereupon he filed in the receivership suit, upon leave granted, an intervening petition, praying that judgment be satisfied out of the properties so acquired by the new company." (Page 307, Orig. Ed., page 1065 Law. Ed.)

The court said (page 315 Orig. Ed., 1069 Law. Ed.):

> "No good reason is shown why relief may not be had as well upon the intervening as upon the original bill."

The Court of Appeals in a footnote (Rec. 87, note 4) has listed four cases, discussing the rights to intervene in varying circumstances. In one case the plaintiff in a personal injury case was permitted to intervene in a suit for a declaratory judgment brought by her defendants against the Clerk of the Court and the Director of Traffic. (*Champ* v. *Atkins,* (1942) 76 U. S. Appeals D. C. 15, 128 Fed. (2d) 601.)

Was the Judgment of the District Court Denying the Appellants' Motion to Intervene Appealable?

The petitioners have treated this under a slightly different title (Petitioners' brief, page 21 et seq.).

Reliance is had upon *U. S.* v. *California Co-operative Canneries,* 279 U. S. 553, and *Allen Calculators, Inc.* v. *National Cash Register Co.,* decided May 1, 1944, both quoted above.

Each of these cases arose under a Federal statute with respect to appealable orders.

The *Canneries* case arose in the District of Columbia, but the basic act was the Anti-Trust Act. The appeal was apparently a general appeal, not a special appeal as allowed by the District of Columbia statute.

There is a marked difference between the Federal statute (Title 28, Sections 225 and 227, U. S. Code) and the District of Columbia statute (Title 17, Section 101, D. C. Code). In the Federal statute, there is no provision comparable to the appellate jurisdiction of the United States Court of Appeals for the District of Columbia, by which an appeal may be allowed "from any other interlocutory order in the discretion of said United States Court of Appeals for the District of Columbia."

The Appellate Court, on proper petition, allowed the appeal (Rec. 79 and 80), and when the matter came on for final hearing, reversed the order (Rec. 87).

It is respectfully submitted that this practice is permissible under the District of Columbia statute.

An Attempted Interference With Administrative Remedies

Since the decision in *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 71 Law. Ed. 303, which was the parent of most zoning cases, there has been a remarkably liberal advancement in administrative remedies. The tendency has been to leave questions of fact to administrative agencies where they are vested with jurisdiction at law to decide them.

Certain sections of the zoning law are cited in the opinion of the court below (Rec. 86 and 87). Title 5, Sec. 413 D. C. Code confers power and jurisdiction upon the Zoning Commission to regulate, "the location, height, bulk, number of stories and size of buildings and other structures * * * and the uses of buildings, structures and land * * * and for the purpose of such regulations said commission may divide the District of Columbia into districts and zones."

The following cases held that the court will not interfere with the administrative remedies:

Myers v. *Bethlehem Ship Building Corporation*, 303 U. S. 41, 82 Law. Ed. 639.

Newport News Ship Building Corporation v. *Schauffer*, 303 U. S. 54, 82 Law. Ed. 646.

U. S. v. *Los Angeles and Salt Lake Railroad,* 272 U. S. 299, 71 Law. Ed. 651.

Morgan v. *Hines,* 72 App. D. C. 331, 113 Fed. (2d) 849.

Federal Power Commission v. *Metropolitan Edison Co.,* 304 U. S. 375, 82 Law. Ed. 1408.

Switchmen's Union v. *National Mediation Board,* No. 48 Supreme Court United States, Nov. 22, 1943—Co-op Ed. page 89.

General Committee of Adjustment of the Brotherhood of Locomotive Engineers for the Pacific Lines of Southern Pacific Company v. *Southern Pacific Company, et al.,* Nos. 27 and 41—Nov. 22, 1943—Supreme Court U. S. Co-op Ed. page 112.

General Committee of Adjustment of the Brotherhood of Locomotive Engineers for the Missouri-Kansas-Texas Railroad, an Unincorporated Association v. *Missouri-Kansas-Texas Railroad Company, et al.,* Supreme Court of the U. S. No. 23, Decided Nov. 22, 1943—Co-op Ed. page 104.

Engineers Public Service Company, et al. v. *Securities and Exchange Commission,* No. 8394, in the U. S. Court of Appeals for D. C., Nov. 22, 1943.

CONCLUSION

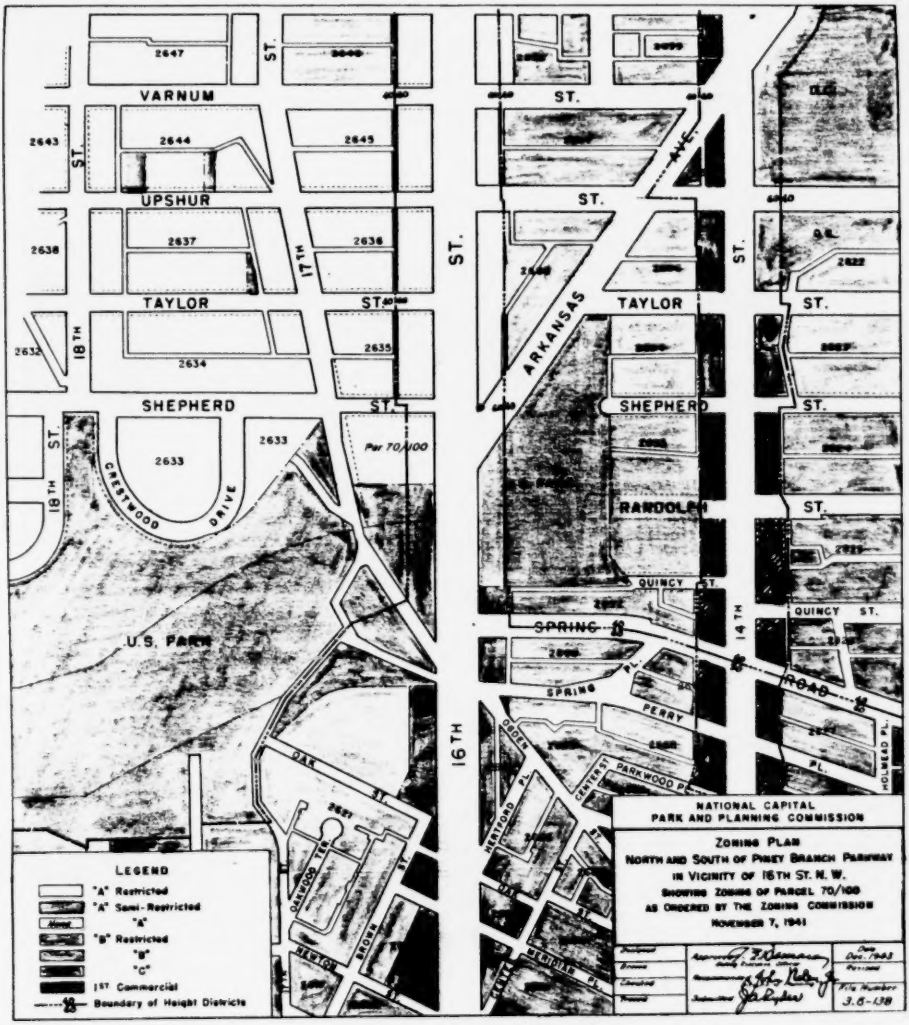
It is respectfully submitted that the equities of this case are strongly with these respondents. The owner of land in a fine residential area of Washington and a contract purchaser of that land, knowing from the nature of things that an apartment house would be ruinous to the beauty of the city and the neighborhood in particular, entered into an aleatory contract, and ask the court to enforce it. It seems proper that this court should say to the contract purchaser, as this court said in the *Euclid-Ambler* case, *supra,*

"Sic utere tuo ut alienum non laedas."

It is urged that certiorari be denied.

Respectfully submitted,

H. Winship Wheatley,
1010 Vermont Ave., N. W.,
Washington, D. C.,
Attorney for Respondents.

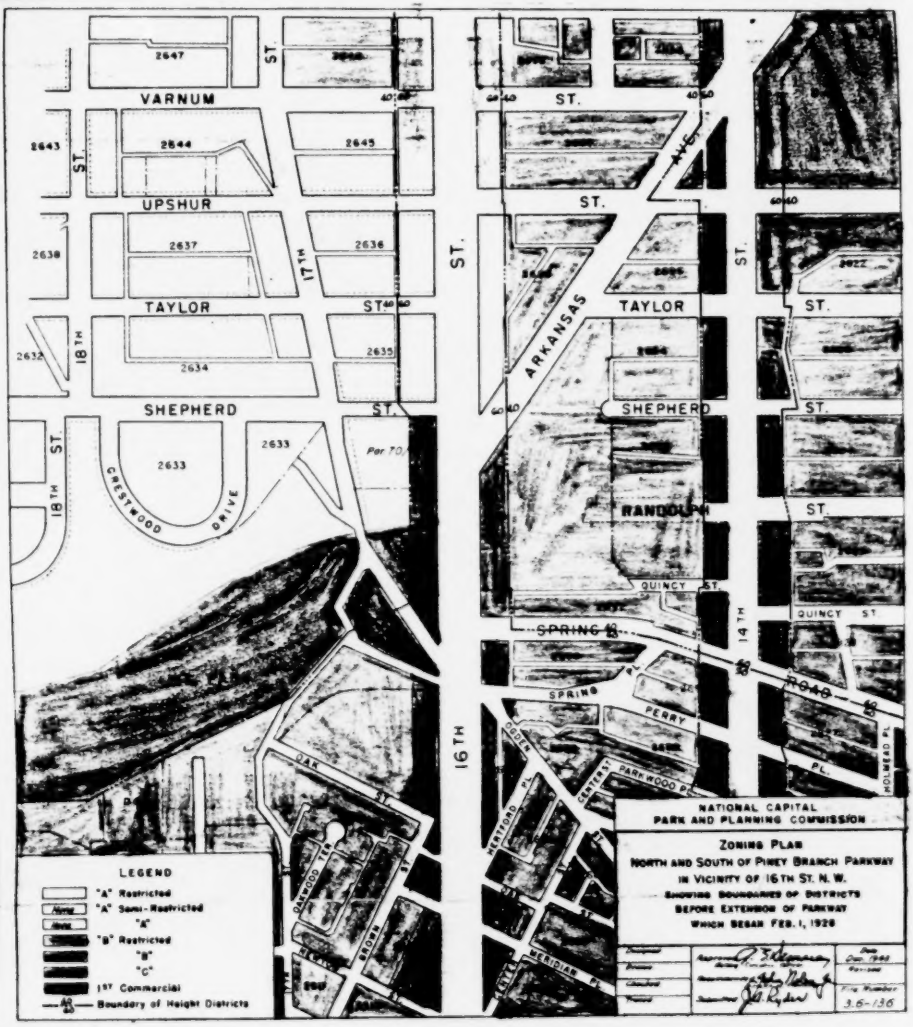


MAP. II. Same Portion of Zoning Plan of the District of Columbia After Enlargement of Piney Branch Parkway

RESPONDENTS' NOTE

Under the Zoning Regulations of the District of Columbia apartment houses cannot be built in "A" Restricted, "A" Semi-Restricted, or "B" Restricted areas. Dwellings in such areas may be only of the single-family type.

The above portion of the zoning plan of the District of Columbia, after the enlargement of Piney Branch Parkway, shows that after the Parkway had been enlarged that it became the logical dividing line between the single-family dwelling area to the north and the multi-family (apartment house) area to the south. It is obvious that Parcel 70/100 belongs to the single-family dwelling area which extends to the north and west of Parcel 70/100 and embraces all of the area in the vicinity of Sixteenth and Shepherd Streets north of Piney Branch Parkway. It shows a comprehensive zoning plan as determined by the Zoning Commission after the enlargement of Piney Branch Parkway and the major improvements made in 1939 and 1940.

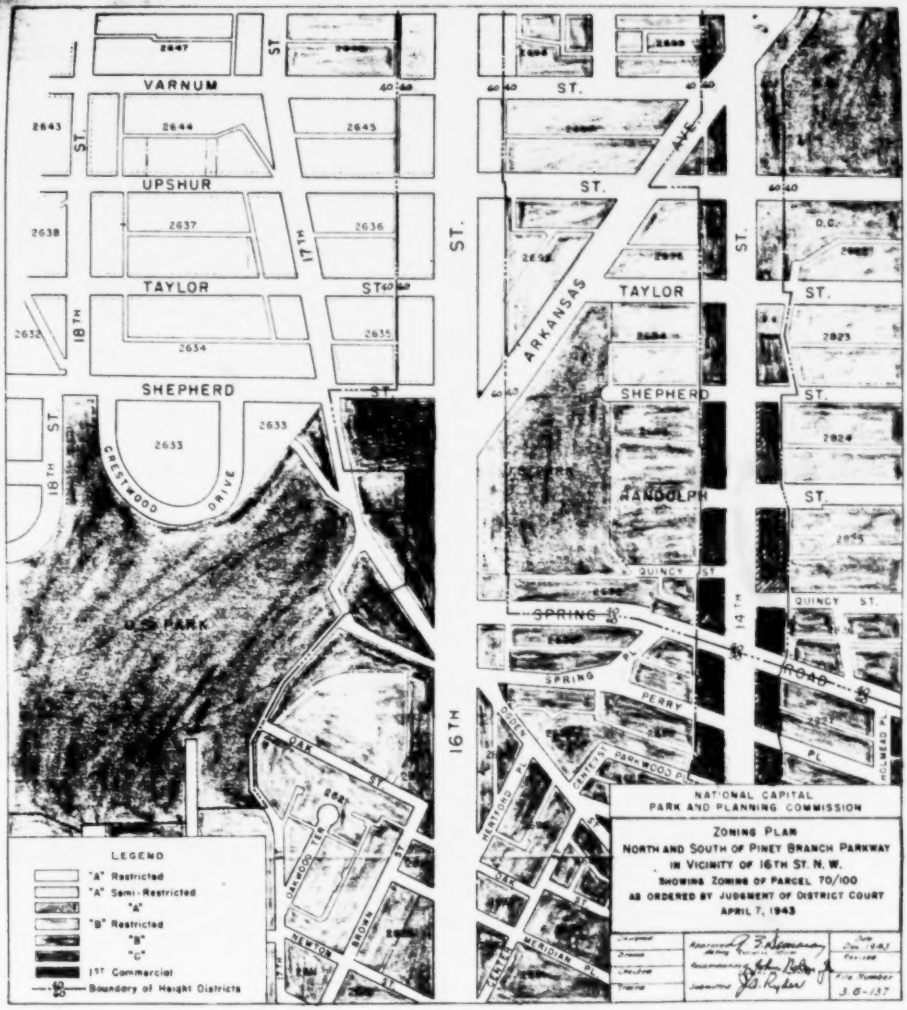


MAP I. Portion of Zoning Plan of the District of Columbia Prior to Enlargement of Piney Branch Parkway

RESPONDENTS' NOTE

Under the Zoning Regulations of the District of Columbia apartment houses cannot be built in "A" Restricted, "A" Semi-Restricted, or "B" Restricted areas. Dwellings in such areas may be only of the single-family type.

The above portion of the zoning plan of the District of Columbia, prior to the enlargement of Piney Branch Parkway, shows a comprehensive zoning plan under the conditions existing at that time (1928) with Shepherd Street as the dividing line between the single-family dwelling area to the north and the multifamily (apartment house) area to the south. Development of the area immediately north of Piney Branch Parkway, which is known as Crestwood, was not commenced until late in 1937.



MAP. III. Same Portion of Zoning Plan of the District of Columbia as it Would be if the Lower Court is Sustained

RESPONDENTS' NOTE

Under the Zoning Regulations of the District of Columbia apartment houses cannot be built in "A" Restricted, "A" Semi-Restricted, or "B" Restricted areas. Dwellings in such areas may be only of the single-family type.

The above portion of the zoning plan of the District of Columbia, as it would appear if the lower court is sustained, shows the introduction of a multifamily (apartment house) spot into a single-family dwelling area, and the breaking down of a neighborhood of single-family dwellings, as established by the Zoning Commission, along and west of Sixteenth street and north of Piney Branch Parkway. This is patently spot zoning.

EXHIBIT IV.

Copy October 7, 1941

MINORITY REPORT OF THE ZONING ADVISORY COUNCIL.

CASE #2 OCTOBER 8, 1941 HEARING

Application of C. V. Maudlin, et al. requesting an amendment to the zoning map by change from Residential, 60' "A" Area to Residential, 40' "A" Restricted Area parcel 70/100, located at the southwest corner of 16th and Shepherd Streets, N. W.

The present apartment house zoning of this 2.07 acre tract at 16th and Shepherd Streets is by no stretch of the imagination a part of any comprehensive plan as the zoning law requires. It is in fact an outstanding case of spot zoning and constitutes an opening wedge for further apartment house zoning north of this point.

While the original zone plan of 1920 may have had some basis for its adoption, conditions have materially changed since this plan was formulated. As it is the duty of the Zoning Commission to keep this plan up to date, the new conditions are sufficient reason for the Zoning Commission to modify the original plan to conform. Of most importance perhaps is the fact that Piney Branch Parkway has been considerably widened and extended in the last 13 years at a considerable expenditure of public funds, definitely separating the private development north and south of the Parkway at 16th Street. South of the Parkway the zoning and development has been consistently and properly of the multi-family type. North of the Parkway to the District Line the development is entirely detached single-family residence of the most restricted character, *with the sole exception of the parcel in question*, which is thus granted a special privilege not enjoyed by any other property owner north of Piney Branch Parkway.

There are ample court decisions supporting the right of zoning authorities to change any unimproved property from a less restricted to a more restricted classification, if conditions change and it is necessary to the maintenance of the comprehensive character of the zone plan. In this case the enlargement of Piney Branch Parkway has made it a

definite physical barrier between the multi-family develop-mnt to the south and the subdivision and development with single family detached homes of acreage property in the Crestwood section immediately to the north and west.

It is therefore recommended that the zoning of Parcel 70/100 be changed to "A" Restricted, with the 16th Street frontage in the 60′ height district and the rear portions in the 40′ height district, following the same plan as prevails for several miles to the north of this parcel.

(s) JOHN NOLEN, JR.

EXHIBIT V.

NATIONAL CAPITAL PARK AND PLANNING COMMISSION.

Interior Building,
Washington, D. C.

April 19, 1943.

The Zoning Commisison,
District Building,
Washington, D. C.

Gentlemen:

At the meeting of the National Capital Park and Planning Commission on April 16, the attention of the Commission was drawn to the decision of the District Court of the United States for the District of Columbia in civil action No. 14606, that the rezoning of the property owned by Harry Poretsky at 16th and Shepherd Sts. N. W., was void and should be vacated and set aside.

In the opinion of the Commission this decision constitutes a definite threat to the principles of comprehensive zoning and city planning, and to the powers of the Zoning Commission to make changes in the zoning plan from time to time as conditions change in the various parts of the city. The Commission urges that all practical means be adopted to obtain a reversal of this decision.

The action of the court appears to conflict with many of the provisions of Section II of the Zoning Act of June 20, 1938, as a reading of this section will reveal. The decisions of the higher courts in zoning cases are so frequently based on the fundamental relation of the issue to a comprehensive

plan, that it would be reasonable to expect that if this phase of the case in question were stressed in an appeal, an entirely different decision might be obtained. Certainly the desire to make the plan for 16th Street comprehensive, and to encourage the stability of the "A" Restricted district and of the land values therein, was a controlling motive in the action taken by the Zoning Commission in 1941. The decision of the Court apparently gives no weight to these motivations, so clearly stated in the law.

Your attention is also directed to several statements in the decision which are open to question as matters of fact. For example, it is stated that the property had been assessed for taxation on a valuation based on its availability for the erection of an apartment building though the records show that there has been no change in the assessment since 1930 when more than 2/3 of the property was in the "A" Restricted district. Furthermore, it is stated that this property is situated at the foot of a hill, when as a matter of fact most of it is above the grade of the adjoining streets. Another point, which it is in the power of the Zoning Commission to correct, is that the property immediately across 16th Street is zoned for apartments. The failure to remove this very small, detached and illogical residue of the former "C" Area district at the same time the Poretsky property was changed is, of course, unfortunate, but a condition that could be remedied readily by the Commission. One piece of spot zoning should not be allowed to justify another.

This Commission will be glad to cooperate in this matter if it can be of any assistance.

Sincerely yours,

U. S. Grant, 3rd,
Major General, U. S. Army,
Chairman.

JN:HL
CC:Mr. Demaray.

EXHIBIT VI

IN THE SUPREME COURT
OF THE UNITED STATES.

OCTOBER TERM, 1944

No. 579

HARRY PORETSKY, ARTHUR W. MACHEN, Trustee, and THOMAS MACHEN, *Petitioners*,

v.

JULIUS H. WOLPE ET AL., AND CHARLES W. KUTZ, ET AL., as Members of the Zoning Commission of the District of Columbia, *Respondents*

STIPULATION

It is stipulated between counsel that the date May 8, 1943, appearing at the top of the proposed intervening petition on page 57 of the printed transcript, is a printer's error and that it should be May *6*, 1943. The date on the transcript filed in the Court of Appeals is indistinct but counsel have verified the date from the docket of the trial court and the date is May *6*, 1943. The docket in the trial court shows that the proposed intervening petition was filed at the same time that the motion for leave to intervene was filed.

LOUIS OTTENBERG,
EDWIN SHELTON,
Attorneys for Poretsky.

WILLIAM C. SULLIVAN,
Attorney for Arthur W. Machen, et al.

VERNON E. WEST,
Attorney for Zoning Commission.

H. WINSHIP WHEATLEY,
Attorney for Wolpe et al.